BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JUDY A. WARD Claimant	)	
VS.	)	
ALLEN COUNTY HOSPITAL Respondent	)	Docket No. 1,053,194
AND	)	
ACE AMERICAN INSURANCE CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the February 8, 2013, Award entered by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on May 14, 2013. Patrick C. Smith, of Pittsburg, Kansas, appeared for claimant. Anton C. Andersen, of Kansas City, Kansas, appeared for respondent.

The ALJ found claimant had a 25 percent functional impairment, which he reduced to 10 percent after also finding claimant had a 15 percent preexisting impairment. The ALJ further found claimant had a 75.75 percent[1] work disability.

The Board has considered the record and adopted the stipulations listed in the Award.

[1] In the body of the Award, at page 9, the ALJ finds claimant has a 75.75 percent work disability, but he used a work disability of 75.5 percent to calculate her percentage of impairment on page 11.

ISSUES

Respondent requests review of the manner in which the ALJ deducted claimant's preexisting impairment. Respondent argues the ALJ erred by compensating claimant for both a functional and a work disability.

Claimant argues respondent did not prove she had a 15 percent preexisting impairment. In the event the Board finds the award should be reduced by a preexisting impairment, claimant argues the correct calculation would be to reduce claimant's work disability by 15 percent, which would still entitle claimant to the maximum award of $100,000.

The issues for the Board's review are:

1. Did respondent prove claimant had a preexisting permanent functional impairment to the whole body?

2. If so, did the ALJ err in his calculations to reduce the award due to the preexisting permanent functional impairment?

FINDINGS OF FACT

Claimant was employed by respondent in December 1993. She worked a 12-hour shift as a nurse in the emergency room. On April 22, 2010, claimant was assisting a patient who, without warning, stood up. Claimant had her right arm under the patient's right arm. The patient began to fall, and claimant caught the weight of the patient with her arm. Claimant immediately felt pain in her neck and right shoulder. She did not seek immediate medical attention, but before she went home she asked a physician's assistant for some pain medicine because she had hurt her neck.

Claimant returned to work the next day, but she only worked an 8-hour shift. She did not work April 24 through April 26. Her pain intensified, and she went to respondent's emergency room on April 27, 2010.

Claimant was treated conservatively but eventually was referred to neurosurgeon Dr. Nazih Moufarrij. Claimant tried to work an 8-hour shift on August 8, 2010, but she was unable to return to work after that. Dr. Moufarrij performed an anterior discectomy with interbody fusion at the C6-C7 levels on September 1, 2010. Claimant continues to have chronic neck pain and pain in her shoulder, down her right arm and into her right hand. She has decreased range of motion in her neck and right arm. She has trouble with handwriting, cannot blow dry her hair or operate a vacuum, and rarely drives because she has trouble turning her neck to the right.

Claimant previously underwent neck surgery in 2003. She did not sustain an accident at that time. She said she was just unable to get up out of bed one morning because of severe pain in her neck. Claimant had neck surgery in June 2003 and was off work for 9 to 12 weeks, after which she returned to work. After the 2003 surgery, claimant had some weakness in her right arm and hand. However, she returned to her same job and same responsibilities with no restrictions. Claimant had not sought medical attention from any physician regarding her neck from the time of her release from treatment after the 2003 neck surgery until her work-related accident in April 2010. To claimant's knowledge, she never received an impairment rating on her neck in 2003. She had no permanent restrictions following her surgery in 2003. Claimant did not miss any work from 2003 through April 22, 2010, because of neck pain, nor did she have any trouble performing her normal activities at work or outside of work.

Dr. Edward Prostic, a board certified orthopedic surgeon, examined claimant on May 14, 2012, at the request of claimant's attorney. Claimant complained of pain at the back of her neck going to her right shoulder and down her arm with frequent numbness to the index and long fingers. On examination, Dr. Prostic found claimant had limited range of motion of her neck. Claimant had positive testing for thoracic outlet syndrome on the right. Claimant had negative testing for carpal tunnel syndrome and rotator cuff dysfunction. Dr. Prostic opined that claimant sustained injury to her cervical spine at C6 to C7, and had surgery on September 1, 2010, for a herniated disc. Dr. Prostic said claimant was improved after the surgery but still had evidence of thoracic outlet syndrome and symptoms consistent with carpal tunnel syndrome. Dr. Prostic agreed no medical provider had diagnosed claimant with thoracic outlet syndrome or carpal tunnel syndrome before his examination on May 14, 2012.

Based on the AMA *Guides*,[2] Dr. Prostic rated claimant as having a 15 percent functional impairment to the whole body. Dr. Prostic's said his entire 15 percent permanent partial is new impairment of the body as a whole from the 2010 accident, although he agreed claimant may have had some preexisting impairment.

Dr. Prostic had no evidence claimant had any condition that interfered with her activities of daily living prior to her accident in April 2010. Nor was there any evidence that claimant had any loss of a portion of her physiological capabilities prior to the April 2010 accident. However, Dr. Prostic said if he had seen claimant after her 2003 surgery, he would likely have given her some impairment from the surgery.

Dr. Prostic testified claimant was unable to work beyond light duty and should avoid repetitious, forceful gripping, keying or handwriting. Dr. Prostic reviewed a task list

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[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

prepared by Jerry Hardin.[3] Of the 19 tasks on the list, Dr. Prostic believed claimant was unable to perform 10 for a 53 percent task loss. Dr. Prostic said the tasks that claimant should not perform solely due to her hand are No. 1, 6, 7 and 8. The remainder of the tasks were excluded because of the light duty requirement due to claimant's neck condition and her thoracic outlet syndrome.

Dr. Paul Stein, a board certified neurosurgeon, examined claimant on October 9, 2012, at the request of respondent. From her medical records and history, Dr. Stein ascertained that claimant had undergone a right C6-7 foraminotomy in 2003, with post-surgery physical therapy. Claimant returned to work about 10 weeks after surgery with some residual numbness in the fingertips of her right hand and some discomfort, but she was able to fully do her job. In the year or so before her 2010 injury, claimant had taken no pain medication for her neck or upper extremities, nor did she have any medical treatment of those areas.

Claimant gave Dr. Stein a history of her April 22, 2010, accident. Claimant said she subsequently developed pain in her neck, predominantly on the right. Claimant ultimately underwent surgery at C6-7. She told Dr. Stein the surgery was unsuccessful, and she continued to have pain in her neck and right shoulder into her right arm. She also had muscle spasms in her right arm, pain at times in the second and third fingers of her right hand, and numbness and tingling constantly in those fingers. Claimant said she had trouble with handwriting but no difficulty holding objects with her right hand.

After taking a history from claimant, reviewing the medical records and performing a physical examination, Dr. Stein stated that claimant had a prior right C7 nerve root irritation that was treated by surgery with mild residual symptomatology. Dr. Stein opined that claimant had a recurrence of symptoms consistent with C7 nerve root irritation on or about April 22, 2010, and subsequently underwent a second surgery. Claimant was still symptomatic, but the fusion and imaging studies looked okay. Dr. Stein found claimant to be at maximum medical improvement. Dr. Stein had no recommendations for further treatment.

Using the AMA *Guides*, Dr. Stein placed claimant in DRE Cervicothoracic Category IV, which carries a 25 percent whole person impairment. Because claimant had previous surgery and preexisting radiculopathy, Dr. Stein, again using the AMA *Guides*, opined she had a 15 percent preexisting disability.

Dr. Stein acknowledged he did not examine claimant before her 2003 surgery, nor did he have access to her previous medical records. He used both the history claimant

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[3] Jerry Hardin, a human resource consultant, interviewed claimant by telephone on June 25, 2012, at the request of claimant's attorney. He compiled a list of 19 tasks claimant performed in the 15-year period before her work-related injury. At the time of the interview, claimant had a 100 percent wage loss.

provided, the AMA *Guides,* and the fact that claimant had radicular nerve root compression resulting in the 2003 surgery, in opining claimant had been in Category III after the 2003 surgery and before the 2010 accident.

Dr. Stein admitted that he had no evidence that claimant had lost a percentage or portion of her physiological capability as it related to her cervical spine prior to the 2010 accident. Dr. Stein testified that under the AMA *Guides*, if a person has cervical spine surgery, that person automatically has an impairment. Dr. Stein said impairment per the *Guides* is loss of physiologic function. Dr. Stein testified that the fact claimant had previous surgery, after which she still had some radicular symptoms, proved she had some loss of physiologic function. Dr. Stein stated a surgeon would not do a foraminotomy if there was no significant sign of radiculopathy, unless the surgeon was not competent. Dr. Stein further stated: "I don't know that I could absolutely document that that was radiculopathy at the level of the Guides, but it would certainly indicate radicular compression and radicular injury. And that's proven by the fact that she improved after surgery."[4]

Dr. Stein recommended that claimant avoid overhead activity, repetitive bending and twisting of her neck, and frequently involved periods of handwriting. He further recommended that claimant lift more than 40 pounds only very occasionally and 30 pounds occasionally. Dr. Stein reviewed the task list prepared by Steve Benjamin.[5] Of the 22 tasks on the list, Dr. Stein opined claimant was unable to perform 11 for a 50 percent task loss.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(c) states:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

In *Payne*,[6] the Kansas Court of Appeals stated:

> K.S.A. 44-501(c) is construed and applied. K.S.A. 44-501(c) permits an award to the extent a work-related injury causes increased disability to a preexisting condition.

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[4] Stein Depo. at 31.

[5] Steve Benjamin, a vocational rehabilitation consultant, interviewed claimant on October 9, 2012, at the request of respondent. He compiled a list of 22 tasks claimant performed in the 15-year period before her work-related injury.

[6] *Payne v. Boeing Co.*, 39 Kan. App. 2d 353, Syl. ¶ 2, 180 P.3d 590 (2008).

> However, the statute also requires any award to be reduced by the amount of any preexisting functional impairment.
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> In *Hanson*,[7] the Court of Appeals held:
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> 3. When a work-related event causes aggravation of a preexisting condition, the employee is entitled to compensation for any increase in the amount of functional impairment. The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.
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> . . . .
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> 5. The burden of proving a workers compensation claimant's amount of preexisting impairment as a deduction from total impairment belongs to the employer and/or its carrier once the claimant has come forward with evidence of aggravation or acceleration of a preexisting condition.

ANALYSIS

The first task the Board is asked to decide is whether claimant possessed a preexisting impairment prior to April 22, 2010. Dr. Stein assessed a preexisting functional impairment of 15 percent, based upon the AMA *Guides* DRE Cervicothoracic Category III. Dr. Stein testified that his assessment of preexisting impairment was based upon the claimant's prior cervical foraminotomy and radiculopathy that persisted after the surgery. Dr. Prostic did not provide an opinion with regard to preexisting impairment. The ALJ found, based on the opinion of Dr. Stein, that claimant had a 15 percent preexisting impairment. The Board agrees.

The more difficult issue in this case is how to apply the credit for preexisting impairment. The ALJ did not address the issue. Respondent requests that the Board apply the credit pursuant to the *Payne* analysis. In *Payne*, the Court of Appeals subtracted the monetary amount of the preexisting credit from the maximum compensation allowable in a permanent total disability claim.

Historically, the Board has not applied the *Payne* analysis in work disability cases.[8] The Board, instead, has subtracted the percentage of impairment determined to be

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[7] *Hanson v. Logan U.S.D. 326,* 28 Kan. App. 2d 92, Syl. ¶¶ 3, 5, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[8] *Ballard v. Dondlinger & Sons Construction Co., Inc.*, No. 1,054,021, 2013 WL 1876342 (Kan. WCAB Apr. 29, 2013); *Jamison v. Sears Holding Corp.*, No. 1,054,942, 2013 WL 1384389 (Kan. WCAB Mar. 8, 2013), Jamison is currently on appeal before the Kansas Court of Appeals; *Gethins v. Cedar Living Center*, No. 250,491, 2002 WL 31950524 (Kan. WCAB Dec. 31, 2002), Gethins was affirmed by the Court of Appeals.

preexisting from the overall percentage of work disability. This has been determined to be the best method to apply K.S.A. 2009 Supp. 44-501(c).

The Kansas Court of Appeals, in *Kirker,*[9] provided an analysis of the history and intent of the 1993 legislative changes:

> Under the pre-1993 version of K.S.A. 44-567, an employer who knowingly hired or retained a person with a preexisting condition could possibly shift all or a portion of the compensation owing for a work-related injury to the Second Injury Fund (known later as the Workmen's Compensation Fund and later still as the Workers Compensation Fund). [Citations omitted.] As explained in *Leiker v. Manor House, Inc.*, 203 Kan. 906, 911, 457 P.2d 107 (1969):
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> > The Second Injury Fund statute was first enacted in 1945 and is supplementary to the Workmen's Compensation Act. [Citation omitted.] Its purpose was to encourage the employment of persons with certain physical handicaps by relieving the employer in part from payment of compensation benefits in limited situations. . . . As amended (in 1961), the declared purpose of the statute is to encourage the hiring of the handicapped. It expresses the idea of achieving this result in a manner that works a hardship on neither the employer nor the employee.
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> In 1993, this aspect of the Workers Compensation Fund was eliminated. Thus, effective July 1, 1994, the Fund was no longer available to relieve employers from the workers compensation burdens that might result from the employment of individuals with preexisting conditions. In place of the Fund, the Legislature enacted the preexisting impairment provisions of K.S.A. 44-501(c). [Citation omitted.]
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> With the elimination of the Workers Compensation Fund, K.S.A. 44-501(c) became the method by which employers were encouraged to hire individuals with preexisting conditions. An additional purpose of K.S.A. 44-501(c) was to reduce the cost of workers compensation premiums to Kansas employers. *Payne,* 39 Kan. App. 2d at 361. K.S.A. 44-501(c) must be interpreted in a manner consistent with the Legislature's intent. 39 Kan. App. 2d at 359-60.

Applying the preexisting credit to carry out the legislative intent in a functional only case is simple. The ALJ must limit the award to the amount determined to be related to the work-related injury and not award compensation for the amount of impairment found to be preexisting. In *Payne*, the court has provided a fairly simple method of determining the preexisting credit in a permanent total disability claim.

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[9] *Kirker v. Bob Bergkamp Const. Co., Inc.*, No. 107,058, (Kansas Court of Appeals unpublished decision filed October 12, 2012, slip. op. at 9-10).

Determining the preexisting credit in a work disability claim presents different issues due to a low maximum benefit cap. Based upon on the numbers proffered in respondents brief, if the Board were to apply the *Payne* analysis to this case, the credit would reduce the total award by $33,988.60, approximately 44 percent. This appears to be excessive based upon a 15 percent preexisting impairment.

In prior interpretations of K.S.A. 2009 Supp. 44–501(c), the Board has subtracted the percentage of preexisting impairment from the percentage of work disability. In *Gethins*, the Board applied the credit in this manner, and the Court of Appeals affirmed the Board without addressing the preexisting credit issue.[10] In this case, based upon precedent, the Board will subtract the 15 percent preexisting impairment from the 75.75 percent work disability and find that claimant has a 60.75 percent work disability.

CONCLUSION

Based upon the foregoing, the Board finds that claimant had a 15 percent functional impairment which preexisted her April 22, 2010, work-related injury. Further, the Board finds that the 15 percent preexisting functional impairment should be subtracted from the overall 75.75 percent work disability.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated February 8, 2013, is modified to reflect a credit for preexisting functional impairment, resulting in a 60.75 percent work disability. ALJ Moore's award is affirmed in all other respects.

Claimant is entitled to permanent partial disability compensation at the rate of $546 per week not to exceed $100,000 for a 60.75 percent work disability. As of May 22, 2013, there would be due and owing to claimant 160.86 weeks of permanent partial disability compensation at the rate of $546 per week in the sum of $87,829.56, for a total due and owing of $87,829.56, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $12,170.44 shall be paid at the rate of $546 per week until fully paid or until further order from the Director.

IT IS SO ORDERED.

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[10] *Gethins v. Cedar Living Center*, No. 90,129, 2004 WL 1245613 (Kansas Court of Appeals unpublished opinion filed Jun. 4, 2004);

Dated this _____ day of May, 2013.

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BOARD MEMBER

DISSENT

K.S.A. 2009 Supp. 44-501(c) states that "[a]ny award of compensation shall be reduced by the amount of functional impairment determined to be preexisting." The award in this case is $100,000. The undersigned understands that in prior interpretations of K.S.A. 2009 Supp. 44-501(c), the Board has subtracted the percentage of preexisting impairment from the percentage of work disability. This is a fair interpretation for cases where the maximum compensation, including the preexisting, falls under the cap. A problem arises, though, where the work disability value exceeds the maximum compensation cap. In cases like the one here, which exceed the cap, the award of compensation is not reduced and the legislative intent of K.S.A. 2009 Supp. 44-501(c) is not achieved.

In cases involving only functional impairment, achieving the legislative intent of K.S.A. 2009 Supp. 44-501(c) is obvious. In permanent total disability claims, *Payne* provides a way to achieve the legislative intent by reducing the maximum compensation by a monetary amount. However, in work disability cases the credit is applied inconsistently based upon a variety of factors, including the average weekly wage and percentage of work disability. If no credit is taken on a maximum compensation case, like this one, the legislative mandate that the "award of compensation be reduced by the amount of functional impairment determined to be preexisting" is not accomplished.

It is the opinion of the undersigned that a fair method of applying the preexisting credit in this and similar cases is to reduce the statutory maximum amount by the percentage of preexisting impairment. For example, in this case the 15 percent preexisting credit would be applied to $100,000, resulting in an award of $85,000. This method is

consistent with the legislative intent and complies with the plain language of K.S.A. 2009 Supp. 44-501(c).

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